SUPREME COURT, U.S.
FILED
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961

No. 676

JOHN C. STARNES,

Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement	2
Reasons for Granting the Writ	3
Conclusion	5
Appendix A	6
Appendix B	6
Appendix C	55

CASES CITED

Anderson v. Yunghau, 329 U. S. 482	5
Bush v. Remington Rand, Inc., 213 F. 2d 456 (2d Cir. 1954), cert. den. 348 U. S. 861	3, 4
Foltz v. Moore-McCormack Lines, Inc., 19 F. R. D. 301 (D. C. S. D. N. Y. 1956)	4

PAGE

Gertler v. United States, 18 F. R. D. 307 (D. C. S. D. N. Y. 1955) 4

Hendrey v. Sims, 22 F. R. D. 10 (D. C. E. D. N. Y. 1958) 4

Iovino v. Waterson, 274 F. 2d 41 (2d Cir. 1959), cert. den., 362 U. S. 949 ..... 3, 4

Perry v. Allen, 239 F. 2d 107 (5th Cir. 1956) 3, 4, 5

STATUTES CITED

Rule 25(a)(1) Federal Rules of Civil Procedure .. 2, 3, 4, 5

Former Statute 28 U. S. C. Section 778 (repealed in 1948) 5

United States Federal Employers Liability Act (45 U. S. C. A., Section 51, et seq.) 2

In the

Supreme Court of the United States

October Term, 1961

No. .....

John C. Starnes,

Petitioner,

v.

The Pennsylvania Railroad Company,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Plaintiff-appellant prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on October 31, 1961.

Citations to Opinions Below

The opinion of the District Court (R. 3a-10a) is reported in 26 F. R. D. 625, and is printed in Appendix "B" hereto, *infra*, pages 7-14. The opinion of the Circuit Court of Appeals (R. 14a-15a), Docket No. 26932, October 31, 1961 (2d Cir.) is printed in Appendix "B" hereto, *infra*, pages 6-7.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on October 31, 1961 (R. 16a-17a), and is printed in Appendix "B" hereto, *infra*, pages 15-16. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Questions Presented

Whether, under Rule 25(a)(1) of the Federal Rules of Civil Procedure, the Court was required to dismiss this action for failure to effect substitution of the proper party within two years after the death of the plaintiff.

Whether Rule 25(a)(1) of the Federal Rules of Civil Procedure can validly operate as a statute of limitations in the absence of statutory support.

Statute Involved

The statutory provision involved is Rule 25(a)(1) of the Federal Rules of Civil Procedure. It is printed in Appendix "A", *infra*, page 6.

Statement

The suit concerns an action commenced under the United States Federal Employers Liability Act (45 U. S. C. A., Sec. 51, *et seq.*) to recover damages for personal injuries sustained by John C. Starnes on November 13, 1956, as a result of the negligence of the defendant-respondent.

Suit was commenced on November 20, 1957. Issue was joined by the service of defendant's answer on December 9, 1957.

On May 5, 1958, the plaintiff, John C. Starnes, died. A motion was made on November 29, 1960, approximately two years and six months after the death of the plaintiff, for an order substituting Anna M. Starnes in her capacity as administratrix of the goods, chattels and credits of John C. Starnes, deceased, as plaintiff in this action.

On December 5, 1960, the defendant-respondent, through its attorneys, made a motion to dismiss plaintiff-appellant's cause of action on the grounds that two years had elapsed since the date of the death of the plaintiff.

On January 25, 1961, an order was entered in the United States District Court, Eastern District of New York denying the motion for substitution and granting the defendant-respondent's motion to dismiss. Citing *Bush* v. *Remington Rand, Inc.*, 213 F. 2d 456 (2d Cir. 1954), cert. den., 348 U. S. 861, and *Iovino* v. *Waterson*, 274 F. 2d 41 (2d Cir. 1959), cert. den., 362 U. S. 949, the District Court held that Rule 25(a)(1) imposed a period of limitations which, in the absence of waiver or estoppel, must be enforced.

On October 31, 1961, an order was entered in the United States Court of Appeals for the Second Circuit affirming the dismissal. Here the Court held that though the Rule is harsh, and though it is currently under study by the present Advisory Committee on Rules of Civil Procedure, while it stands it must be enforced.

Reasons for Granting the Writ

1. The decision of the court below in the instant case is directly in conflict with the decision of the Fifth Circuit Court of Appeals in *Perry* v. *Allen*, 239 F. 2d 107 (5th Cir. 1956), printed in Appendix "C", *infra*, pages 55-68.

In the instant case, both the District Court and the Circuit Court indicate that Rule 25(a)(1) is valid and mandatory as imposing a statute of limitations, unless the doctrine of waiver or estoppel are applicable. Both courts cited as authority the cases of *Bush v. Remington Rand, Inc., supra* (Appendix "B", *infra*, pp. 38-54) and *Iorino v. Waterson, supra* (Appendix "B", *infra*, pp. 16-37).

However, in the Fifth Circuit Court of Appeals case of *Perry v. Allen, supra*, the court held that Rule 25(a)(1) is not a statute of limitations and is invalid insofar as it attempts to abridge the right of a party to bring an action to trial on its merits.

As evidence of the conflict between the Fifth and Second Circuit Court of Appeals it is to be noted that the Second Circuit in the *Iorino* case discusses and rejects the ruling of the Fifth Circuit *Perry* case.

As further evidence of the conflict it is to be noted that the District Courts of the Second Circuit have divided as to the continued validity of the two year limitation of Rule 25(a)(1). The cases of *Hendrix v. Sims*, 22 F. R. D. 10 (D. C. E. D. N. Y. 1958), and the District Court decision of *Iorino v. Waterson*, have followed *Perry v. Allen*. The case of *Foltz v. Moore McCormack Lines, Inc.*, 19 F. R. D. 301 (D. C. S. D. N. Y. 1956) and *Gertler v. United States*, 18 F. R. D. 307 (D. C. S. D. N. Y. 1955) have followed *Bush v. Remington Rand, Inc., supra*.

The question presented is of importance in the administration of the Federal Rules of Civil Procedure. The conflict between the Circuits must be resolved since the problem substantially affects the public interest and could arise in every case where a litigant dies.

2. The decision of the Court below is believed to be erroneous and the conflicting decision of the Fifth Circuit Court of Appeals in *Perry* v. *Allen*, *supra*, correct. The *Perry* case holds that Rule 25(a)(1) is but a rule of procedure and cannot be given the effect of a statute of limitations, and is invalid if construed as such; and that the leading case of this Court[1] which held that the rule did impose a statute of limitations was based upon a statute of limitations (28 U. S. C. Sec. 778) then in force but since repealed, and that the construction there placed upon the rule was in reality the application of the statute as enforced by the Rule.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated January 17, 1962

Respectfully submitted,

IRA GAMMERMAN,
Counsel for Petitioner.

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[1] *Anderson* v. *Yungkau*, 329 U. S. 482.

APPENDIX A

Federal Rules of Civil Practice

Rule 25. Substitution of Parties.

(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district.

APPENDIX B

Opinion of Circuit Court

Per Curiam:

In a reasoned opinion, D. C. E. D. N. Y., 26 F. R. D. 625, Judge Mishler held that this FELA action must fail, since the plaintiff employee died after bringing the action and his widow as administratrix failed to seek substitution as plaintiff within the two-year period required by F. R. 25(a). We sustained this rule as valid in *Iorino* v. *Waterson*, 2 Cir., 274 F. 2d 41, certiorari denied *Carlin, Adm'x* v. *Iorino*, 362 U. S. 949; and although there and in *Bush* v. *Remington Rand, Inc.*, 2 Cir., 213 F. 2d 456, certiorari denied *Remington Rand, Inc.* v. *Bush*, 348 U. S. 861, we held that a defendant by affirmative action might estop

himself from relying on the defense, there is no basis here where defendant did nothing for such a claim. Consequently we are constrained to agree with Judge Mishler's disposition of the case. We realize that the rule is a harsh one and that several attempts have been made to effect its amelioration; indeed it is currently under study by the present Advisory Committee on Rules of Civil Procedure. But while it stands we must enforce it.

Affirmed.

OPINION OF DISTRICT COURT (J. MISHLER)

Plaintiff, John C. Starnes, brought this action pursuant to the Federal Employers Liability Act for injuries allegedly sustained on November 13, 1956. A complaint was filed on November 20, 1957. Plaintiff died intestate on May 5, 1958. On April 8, 1960, limited letters of administration were issued to Anna M. Starnes.

Anna M. Starnes, as administratrix of the goods, chattels and credits of John C. Starnes, moves for an order of substitution. Though the application is made more than two years after the date of death, no reason is assigned for the delay in making the application in the supporting affidavit. However, in answer to the defendant's motion to dismiss as hereinafter set forth, the plaintiff explains "* * * that the delay in making said application was caused by reason of the fact that this office was attempting to obtain a Medical Examiner's report in order to determine whether or not the death of John C. Starnes was causally related to the accident of November 13, 1956. Further delay was encountered by reason of the former attorney's resignation from this firm and the assignment of this case to his successor."

Appendix B

Defendant made an independent motion to dismiss the complaint on the ground that more than two years have elapsed since the date of death.

The pertinent portion of Rule 25(a)(1), pursuant to which both motions are made, states:

> "If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party."

Defendant claims the direction in the rule is mandatory and the action must be dismissed; plaintiff claims the Court may, within its discretion, grant substitution even beyond the two-year period after death.

Though the language of the rule is clear, much has been written concerning its effect.

In June 1946, the Advisory Committee on Rules for Civil Procedure in its final report submitted to the Supreme Court a proposed amendment to Rule 25 which would have infused the flexibility in the rule which the plaintiff now claims it has. It suggested the following insertion, after the first sentence of the rule:

> "If the application is made after 2 years the court may order substitution but only upon showing of a reasonable excuse for failure to apply within that period."

The Advisory Committee pointed out the resultant hardships visited, because of the failure to invest the district courts with discretion. Among the examples cited

was *Anderson* v. *Vaughan*, (C. C. A. 6th, 1946), 153 F. 2d 685. Certiorari had been granted by the Supreme Court; the Advisory Committee had submitted its report at the time the Court had the question under review.

The Court did not adopt the proposed amendment in its promulgating order of December 27, 1946. On January 13, 1947, it affirmed the Circuit Court of Appeals in *Anderson* v. *Vaughan*, (1947) 329 U. S. 482, 67 S. Ct. 428, 10 F. R. S. 479. The Court noted on page 483, that the failure to make application within the two-year period was not due to lack of diligence, since "* * *, petitioner failed to learn of these facts until more than two years later * * *." The Court said at page 485:

> "Rule 25(a) is based in part on 28 U. S. C. 778, 42 Stat. 352, which limited the power of substitution to two years from the death of a party * * *. That policy is reflected in Rule 25(a). Even within the two-year period substitution is not a matter of right; the court 'may' order substitution but it is under no duty to do so. Under the Rule, as under the statute, the settlement and distribution of the estate might be so far advanced as to warrant a denial of the motion for substitution within the two-year period. In contrast to the discretion of the court to order substitution within the two-year period is the provision of Rule 25(a) that if substitution is not made within that time the action 'shall be dismissed' as to the deceased. The word 'shall' is ordinarily 'the language of command.' *Escoe* v. *Zerbst*, 295 U. S. 490, 493. And when the same Rule uses both 'may' and 'shall', the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory. See *United States* v. *Thoman*, 156 U. S. 353, 360."

Appendix B

> "Thus, as stated by the Circuit Court of Appeals, Rule 25(a) operates both as a statute of limitations upon revivor and as a mandate to the court to dismiss an action not revived within the two-year period."

28 U. S. C. 778 (1946) entitled "Death of parties; substitution of executor or administrator," was repealed by the Judicial Code of 1948. The explanation of the House Judiciary Committee for the repeal and omission was that it was superseded by Rules 25 and 81 of the Rules of Civil Procedure.[1]

The clear language of the opinion was further underscored by the court in its promulgating order of December 27, 1946, amending Rule 6(b) by prohibiting the extension of any time for taking any action under Rule 25. Since the discretionary power of the district court under Rule 6(b) was the basis of the dissenting opinion by Justice Rutledge in *Anderson* v. *Yungkau*, *Supra*, the elimination of discretion with regard to enlargement of time under Rule 25(a) would have seemed to place a final quiescence on any doubt.

Nevertheless, courts in this circuit and other circuits have, on occasion, permitted substitution in applications made after the two-year period from date of death had elapsed. Professor Moore in his treatise (Moore's Federal Practice) suggests that the rule should not be applied in a manner indicated in *Anderson* v. *Yungkau*, *Supra*, because of the repeal of 28 U. S. C. 778 (1946), subse-

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[1] H. Rep. No. 308 to accompany H. R. 3214 (80th Cong., 1st Sess. 1947, p. A-239).

quent to that decision. The author says at page 510, in volume 4, 25.01:

> "The *Anderson* case involved a federal matter and 28 U. S. C. 778 (1946), upon which Rule 25(a) was based, had not yet been repealed by the Judicial Code of 1948. Whether Rule 25(a) dealt with a substantive matter was, therefore, immaterial at the time the *Anderson* case was decided, but this aspect has since become important because the Federal Rules may validly deal only with procedure. If, therefore, substitution involves a matter of substance, as we believe it does, Rule 25(a) cannot validly prescribe a 2-year period for substitution in cases involving federal matters, and its supporting statutory basis, 28 U. S. C. 778 (1946) has been repealed * * *."

This view found support in *Perry* v. *Allen*, (5th Cir., 1956) 239 F. 2d 107. The court said at page 112:

> "* * * Rule 25(a)(1) is not a Statute of Limitations and is invalid insofar as it attempts to abridge appellants' substantive right to bring his civil action to trial on its merits by placing a categorical and inflexible time limit upon his right to substitute the collector's administrator. Such an attempt is outside the mandate and inside the caveat of the Act of Congress."

The Court of Appeals of this Circuit held in *Bush* v. *Remington Rand*, 213 F. 2d 456, 464, that Rule 25(a) took the form of a Statute of Limitations and as such could be waived. In that case, the plaintiff had died in 1945, during the pendency of the action. The defendant learned

of plaintiff's death in 1946. Plaintiff's estate was fully settled on March 27, 1947. Defendant raised the issue of no substitution pursuant to Rule 25(a) on July 25, 1949, in its original brief, after trial of the issues before a Master, for the first time, after completion of the hearings. On January 31, 1950, a motion was made to dismiss the action pursuant to Rule 25(a). The District Judge held that by its long delay in raising the issue, the defendant had waived its right to object and was estopped from invoking the Rule. The Court of Appeals concurred in this view in the following language at page 464:

> "We can see no error in this decision. The defendant knew of Mrs. Dysart's death as early as 1946, and if objection had been made at least prior to the hearings in 1949, those proceedings would have been greatly simplified and much time and expense would have been saved. Having stood by while the plaintiffs expended money and effort in bringing the case to judgment, the defendant should no longer be allowed to object."

The Circuit Court of Appeals of this Circuit again had occasion to review the question in issue after *Perry* v. *Allen, Supra*, in *Iovino* v. *Waterson* (1959 2d Cir.), 274 F. 2d 41. In March 1955, the plaintiff commenced an action in the Supreme Court, New York County, by the service of a summons; the defendant removed the action to the District Court; on April 24, 1955, the plaintiff, Waterson, died intestate. Neither plaintiff's attorney nor defendant's attorney knew of the death until 1958. In May 1955, plaintiff's attorney served a complaint on the attorney who appeared for the defendant, Waterson. The latter accepted service, served an answer, and in 1956

examined plaintiffs before trial, and participated in pre-trial conferences before the District Court. Upon learning of the death in 1958, plaintiff's attorneys promptly took appropriate proceedings for the appointment of an administratrix, and then moved in the District Court for an order substituting the administratrix as defendant in the action. The motion was granted in the District Court on the authority of *Perra v. Allen, Supra*. The Court of Appeals rejected the principle stated in *Perra v. Allen*, but affirmed on the authority of *Bush v. Remington Rand, Supra*. The Court said at page 50:

> "In *Bush v. Remington Rand, Inc.*, 2 Circuit 1954, 213 F. 2d 456, 463 465, relying on the analogy that a statute of limitations can be waived, we held that long continued litigation with knowledge of plaintiff's death estopped a defendant from taking advantage of the two year limitation of F. R. 25(a)(1) * * * "

The Court continued at page 51, as follows:

> "The final problem is whether this is a proper case for estoppel * * * an attorney * * * must assure himself of the continued existence of his client before he takes affirmative steps in the client's behalf; that, in the absence of knowledge to the contrary, his adversary may properly assume he has done this; that a client who authorizes an attorney to represent him has impliedly so informed the adverse party; and that no advantage may be taken by the client's personal representative of the attorney's failure to ascertain the fact of the client's death."

Appendix B

In the case at bar, there is nothing in the conduct of the defendant from which can be fashioned a waiver of the limitation or an estoppel to invoke the rule. At best, the plaintiff has shown excusable neglect. The Court of Appeals has pointed out in *Iorio* v. *Waterson*, *Supra*, that this is not enough. Distinguishing the facts of that case from *Anderson* v. *Yungkau*, *Supra*, the Court said at page 30:

> "In *Anderson* the Supreme Court was concerned with excusable neglect, not with estoppel."

It may well be that Rule 25 . . . . . is easily the poorest rule of all the Federal Rules." (Moore's Federal Practice, Volume 4, 25.01, page 510). It is significant to note, however, that the Supreme Court failed to adopt the final report of October 1955, of the Advisory Committee with respect to the proposed amendment to Rule 25.

Motion by plaintiff to substitute Anna M. Starnes as administratrix as plaintiff is denied.

Motion by defendant to dismiss pursuant to Rule 25(a)(1) is granted.

Submit orders.

JACOB MISHLER
U. S. D. J.

Appendix B

JUDGMENT OF CIRCUIT COURT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of October one thousand nine hundred and sixty-one.

Present: HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
Circuit Judges.

J. C. STARNES,
Plaintiff-Appellant,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

Appendix B

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are affirmed.

A. Daniel Fusaro
Clerk

Opinion—Iovino v. Waterson

Friendly, Circuit Judge.

The question is whether, in a suit removed to the Southern District of New York because of diversity of citizenship, the District Court could order substitution of an administratrix *ad litem* of the defendant appointed in New Jersey, under F. R. Civ. Proc. 25(a) (1), quoted in footnote 2 below, although application for this was not made until more than two years after defendant's death. We hold that it could.

The suit was brought by plaintiffs, residents of New York, to recover for personal injuries sustained in Virginia in December, 1954, while passengers in an automobile owned by defendant and operated by his son, who was killed. The action was begun in March, 1955, in the Supreme Court, New York County, by the service of summons in New York on Waterson, a resident of New Jersey. The defendant removed to the District Court. On April 24, 1955, Waterson died intestate. He left no property in New York, other than such rights of exoneration or indemnity, if any, as he may have had from insurers in connection with the claims here asserted. Plaintiffs' attorneys remained ignorant of defendant's death, and the attorney who appeared for Waterson and now appears as

attorney of record for the administratrix asserts that he likewise was. In May, 1955, plaintiffs' attorneys served a complaint on the attorney who had appeared for Waterson. The latter accepted service, served an answer, and, in 1956, examined plaintiffs before trial and participated in pretrial conferences before the District Court. No mention was made of Waterson's death.

It was not until the spring of 1958 that plaintiffs' attorneys learned of this. They promptly took appropriate proceedings in New Jersey for the appointment of an administratrix *ad litem* and then moved in the District Court for an order substituting her as defendant in this action and granting them leave to serve an amended complaint. Over the objection of the administratrix, the District Court granted the relief sought. On motion made by the administratrix within 10 days thereafter, the District Court amended its order to include the certificate required as a premise for a motion for leave to appeal under 28 U. S. C. A. 1292(b). This Court granted such leave.

The order substituting the New Jersey administratrix can stand only if plaintiffs are able to establish each of the following propositions:

I. F. R. Civ. Proc. 25(a) (1) permits the substitution of personal representatives of non-resident as well as of resident decedents.

II. A Federal Rule permitting the substitution of the personal representative of a non-resident decedent does not violate the due process clause of the Fifth Amendment.

III. Application of a Federal Rule permitting the substitution of the personal representative of a non-resident

decedent in a suit where Federal jurisdiction is based on diversity of citizenship and in a state that has not permitted such substitution, is not beyond the scope of the act, 28 U. S. C. A. 2072, authorizing the Supreme Court to establish rules for "the practice and procedure of the district courts of the United States" and does not go beyond Federal legislative power.

IV. Plaintiffs are not precluded from effecting substitution under F. R. Civ. Proc. 25(a) (1) because of their failure to act within the two-year time limit there provided.

We shall examine these propositions and set forth our reasons for believing that plaintiffs can carry each of them.

I.

[1] *F. R. Civ. Proc. 25 (a) (1) permits the substitution of personal representatives of non-resident as well as of resident decedents.*

The provisions of F. R. Civ. Proc. 25(a) (1) in regard to substitution must be considered in the light of the development of the law as to the revivor of actions against foreign administrators in state and Federal courts. This we shall now summarize.

The American Law Institute's Restatement of the Law of Conflict of Laws states, 512, "No action can be maintained against any administrator outside the state of his appointment upon a claim against the estate of the decedent." A comment says this rule applies "although the action in which it is now sought to make the foreign ad-

ministrator a party was begun against the decedent in his lifetime and the Court had jurisdiction over his person." In the view of the reporter, this doctrine, to which he was deeply attached, rested not merely on the difficulties that such an action would cause to orderly administration but "upon a much more fundamental reason than mere expedience." 3 Beale, Conflict of Laws 1553.[1]

The rule of the Restatement was supported by decisions of the courts of New York. In Helme v. Buckelew, 1920, 229 N. Y. 363, 128 N. E. 216, Judge Cardozo had expounded the received doctrine and, in order to avoid constitutional doubts, had construed 1836a of the Code of Civil Procedure, Laws 1911, ch. 631, which had granted broad permission for foreign executors and administrators to sue or be sued, as authorizing only suits by them and those suits against them where "the subject matter subjects them to the jurisdiction" (229 N. Y. at page 373, 128 N. E. at page 219). Five years later the New York Legislature, in an amendment to 160 of the Decedent

[1] Professor Beale elaborated this as follows: "The court in this case • • • [would be] attempting to impose an obligation owed by the deceased upon another person, his executor. Such an imposition could be made only by a sovereign having power over the executor • • • By taking upon him the administration of the estate in the state of his appointment he submitted to the obligations which the administration entailed under the laws of that state, but he submitted to none which rose under the laws of another state. To render judgment against him in another state would be forcing him against his will to pay another man's debts." 3 Beale, The Conflict of Laws, 1554 (1935). The treatise draws no distinction between initiating and reviving suits against foreign personal representatives. In Professor Beale's view, even consent by the foreign personal representative was ineffective. He permitted an exception only where it could be affirmatively shown that the courts of the appointing state would recognize the judgment. Id. at 1555-1558.

Appendix B

Estate Law, provided for revivor against foreign executors and administrators in language that defied the negating construction of Helme v. Buckelew. The Court of Appeals answered, in an opinion by Judge Pound, that "on the authority of recent and persuasive *dicta* in Helme v. Buckelew, supra, as herein enlarged, the constitutional requirement of due process of law precludes the Legislature from providing generally for continuing judgments *in personam* against the foreign executors or administrators of deceased defendants." McMaster v. Gould, 1925, 240 N. Y. 379, 388, 148 N. E. 556, 559, 40 A. L. R. 792. The Court made clear just what due process requirement it had in mind by quoting (240 N. Y. at page 385, 148 N. E. at page 559) from Pennoyer v. Neff, 1878, 95 U. S. 714, 733, 24 L. Ed. 565.

The Federal courts in New York had earlier reached the same result. Lawrence v. Southern Pacific Co., C. C. E. D. N. Y. 1910, 177 F. 547; Stromeyer Co. v. Aldrich, D. C. E. D. N. Y. 1915, 227 F. 960. Indeed, Judge Learned Hand's opinion in Thorburn v. Gates, D. C. E. D. N. Y. 1915, 225 F. 613, was a precursor of the construction of 1836a of the Code of Civil Procedure later adopted by Judge Cardozo in Helme v. Buckelew. Once the New York courts had spoken, the Federal courts in New York would have followed the New York decisions, even without benefit of Erie, so long as Congress had not given a contrary direction. Baltimore & Ohio R. v. Joy, 1899, 173 U. S. 226, 19 S. Ct. 387, 43 L. Ed. 677.

In 1921 Congress gave such a direction. Ever since the first Judiciary Act, Rev. Stat. 955, it had been provided that "When either of the parties, whether plaintiff or petitioner or defendant, in any suit in any court of the

United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment." By the Act of November 23, 1921, 42 Stat. 323, Congress amended this provision, then embodied in 28 U. S. C. 778, by adding a new paragraph that "the jurisdiction of all courts of the United States shall extend to and over executors and administrators of any party, who dies before final judgment or decree, appointed under the laws of any State or Territory of the United States, * * * and such courts shall have jurisdiction within two years from the date of the death of the party to the suit to issue its *scire facias* to executors and administrators appointed in any State or Territory of the United States which may be served in any judicial district by the marshal thereof." The legislative history placed it beyond doubt that the intention was to reverse for the Federal courts the rule of no revivor by or against administrators or executors appointed by the courts of another state or territory. H. R. Rep. No. 429, 67th Cong., 1st Sess., 1-2; 61 Cong. Rec. 7056.

The Federal courts applied the 1921 amendment in accordance with its language and declared purpose. Luster v. Martin, 7 Cir., 58 F. 2d 537, certiorari denied 1932, 287 U. S. 637, 53 S. Ct. 86, 77 L. Ed. 552; Plimpton v. Mattakeunk Cabin Colony, D. C. D. Conn. 1934, 6 F. Supp. 72, and cases cited. No consideration appears to have been given at the time to whether the difficulties that had led the Court of Appeals to hold the act of the New York legislature offensive to the due process requirements of the Fourteenth Amendment created any problem for Congress under the Fifth. Nor in those days, when "*Erie* was still hidden in the mist of the future," Robert Law-

rence Co. v. Devonshire Fabrics, 2 Cir., 271 F. 2d 402, was question raised whether the 1921 enactment went beyond Federal legislative power.

Federal Rule 25(a) (1), which we quote in the margin,[2] carried forward 28 U. S. C. A. 778, including the 1921 amendment permitting revivor by or against foreign administrators or executors. Although the simple phrase used in the Rule, "substitution of the proper parties," might not alone have sufficed to evidence that intent, the retention of the 1921 provision for service "in any judicial district" and the note of the Advisory Committee make it plain that the purpose was to include the 1921 amendment for revivor by or against foreign personal representatives. 4 Moore, Federal Practice ¶25.05, at 518 (2d ed. 1950).

The final chapter in this history is the repeal of 28 U. S. C. A. 778 by the Revision Act of 1948, 62 Stat. 993. However, since this repeal was for the stated reason that 778 was "Superseded by Rules 25 and 81 of the Federal Rules of Civil Procedure," H. R. Rep. No. 308, 80th Cong., 1st Sess., Rule 25(a) (1) must still be construed to include foreign administrators and executors. 4 Moore, Federal Practice ¶25.05, at 518.

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[2] "Substitution of Parties

"(a) Death

"(1) If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made the action shall be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district."

Appendix B

II.

[2] *A Federal Rule permitting the substitution of the personal representative of a non-resident decedent does not violate the due process clause of the Fifth Amendment.*

Whether or not the Fourteenth Amendment bars New York from enacting a general statute bringing foreign administrators into suits validly commenced against their decedents, we think the Fifth Amendment creates no bar to such action by Congress.

Since "Congress could provide for service of process anywhere in the United States," Mississippi Publishing Corp. v. Murphree, 1946, 326 U. S. 438, 442, 66 S. Ct. 242, 245, 90 L. Ed. 185, it could have authorized the plaintiffs to sue in the Federal courts in New York and obtain jurisdiction of Waterson by service in New Jersey, as it has done in actions of many other sorts, 2 Moore, Federal Practice, ¶4.42 (2d ed. 1947). If Congress could thus have authorized service of process on Waterson in New Jersey, there would seem to be no greater due process objection to its authorizing the substitution of an administrator appointed by New Jersey. See Commercial Solvents Corp. v. Jasspon, D. C. S. D. N. Y. 1950, 92 F. Supp. 20. And even if it would be an unconstitutional intrusion on the sovereignty of New Jersey for New York to permit an action properly commenced against a New Jersey decedent to continue against his personal representative, a proposition which we deem doubtful, cf. Morris v. Jones, 1947, 329 U. S. 545, 67 S. Ct. 451, 91 L. Ed. 488, no such objection could prevail against the United States. For while New Jersey may not have yielded to a sister state power over an administrator appointed by its courts,

it has yielded to the United States the power to take such action, consistent with procedural fairness, as is appropriate to make effective the grant of judicial power in Article III over controversies between "Citizens of different States."

III.

[3] *Application of a Federal Rule permitting the substitution of the personal representative of a non-resident decedent in a suit where Federal jurisdiction is based on diversity of citizenship and in a state which has not permitted such substitution, is not beyond the scope of the act, 28 U. S. C. A. 2072, authorizing the Supreme Court to establish rules for "the practice and procedure of the district courts of the United States" and does not go beyond Federal legislative power.*

Two other objections are made to the validity of F. R. 25(a) (1), as here sought to be applied. The first is that if the Rule is construed to permit the substitution of Waterson's administratrix, the Rule would go beyond the authority conferred on the Supreme Court by the Enabling Act, 28 U. S. C. A. 2072, to prescribe "the practice and procedure of the district courts of the United States" and would offend the direction in that Act that the rules "shall not abridge, enlarge or modify any substantive right." The second is that if the Rule is so construed and applied in a case such as this, where jurisdiction rests solely on diversity of citizenship, it transcends Federal legislative power. Erie R. v. Tompkins, 1938, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

The first objection would clearly have been without substance between the effective date of the Federal Rules in

1938 and the repeal of 28 U. S. C. A. §778 by the Revision Act of 1948. During that decade the Rule permitting the substitution of foreign administrators and executors paralleled the statute. We think it would be a reversion to the formalism of a bygone age to hold that the repeal of 28 U. S. C. §778 by the Revision Act for the stated reason that Fed. R. Civ. Proc. 25(a) (1) rendered §778 unnecessary invalidated the very Rule whose existence was the avowed reason for the repeal. On the contrary, this action of Congress seems to evidence its belief in the consistency of the Rule with the Enabling Act. Moreover, whatever the applicability of an "outcome determinative" test to a conflict between Federal and state practice in diversity litigation may be, it would unduly restrict the grant of authority made by Congress to hold that a rule contravenes the Enabling Act as abridging, enlarging or modifying substantive rights merely because a provision admittedly procedural in nature either furthers or prevents the enforcement of such rights. For example, Fed. R. Civ. Proc. 37 provides that in the event of refusal to comply with discovery requests the court may make an order "refusing to allow the disobedient party to support or oppose designated claims or defenses * * *" Nothing could be better calculated to prevent the ultimate vindication of a "substantive right"; yet surely this Rule is within the scope of the power conferred by Congress. Cf. Sibbach v. Wilson & Co., 1941, 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479.

We turn therefore to the objection based on constitutional grounds: It has been said that "the question of substitution * * * is procedural, recognized by the rules as such, and not controlled or governed by local law." Jones v. Schellenberger, 7 Cir., 196 F. 2d 852, 854, cer-

tiorari denied, 1952, La Reau v. Jones, 344 U. S. 876, 73 S. Ct. 171, 97 L. Ed. 679. See also 105 U. Pa. L. Rev. 1088, 1102. The analysis to support this conclusion in the instant case would be that the only substantive rights here are those created by the Virginia law of torts and recognized by the New York law of conflict of laws. Hence steps relating to the enforcement of these rights in New York against Waterson during his life or his representative after his death would be not substantive but procedural.

We have been warned, however, against too ready reliance on such a conceptual analysis. Guaranty Trust Co. of New York v. York, 1945, 326 U. S. 99, 109, 65 S. Ct. 1464, 89 L. Ed. 2079. And appellant contends that an application of Fed. R. Civ. Proc. 25(a)(1) to bring her before the District Court, even in an action validly commenced against her decedent, would run counter to the statements in Guaranty Trust Co. of New York v. York, (326 U. S. at page 109, 65 S. Ct. at page 1470,) that the intent of Erie R. v. Tompkins, supra, "was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court," and that "for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result." Literally appellant may be right. But we do not believe we can properly decide this case by a mere literal reading of Guaranty Trust Co. of New York v. York any more than by applying the litmus-paper test there condemned. We

think at least two factors make this a different case from Guaranty Trust Co. of New York v. York and call for a different result.

The first is that whereas in Guaranty Trust Co. of New York v. York there was a declared policy of New York, embodied in statute, that the action should not proceed, in no real sense can New York be said to have a policy against revivor against a foreign administrator. In 1911 and again in 1925, as we have seen, the New York Legislature endeavored to provide generally for such revivor. It failed only because the Court of Appeals then thought this would transgress limits placed upon New York by the Fourteenth Amendment. See Leighton v. Roper, 1926, 300 N. Y. 434, 439, 91 N. E. 2d 876, 879, 18 A. L. R. 2d 507. The substitution provisions of §81 of the Civil Practice Act, viewed simply as a matter of language and apart from the negative judicial gloss arising from supposed "problems of constitutional power" affecting New York but not the United States, are broad enough today to cover a foreign personal representative. When the New York Legislature amended §52 of the Vehicle and Traffic Law in 1945, Laws, ch. 719, to provide that suits may be revived or even instituted against non-resident administrators or executors for damages sustained as a result of the operation of foreign-owned automobiles within the state, the Court of Appeals, in Leighton v. Roper, supra, sustained this against constitutional at

Section 18[illegible] of the Code of [illegible] was omitted from the Civil Practice Act [illegible] ch. [illegible]. The Legislature repealed [illegible] of the Decedent [illegible] Law [illegible] which occasioned the [illegible] of McMaster v. Gould, supra. However, by Laws, 1951, ch. [illegible], the Legislature re-enacted [illegible] to the extent of authorizing suits by foreign executors and administrators.

tack based on the doctrine of McMaster v. Gould, supra. The Court held that by driving his automobile into the state, the decedent "has consented to the statutory agency for the receipt of process, and has made that consent binding upon his administrator." 300 N. Y. at page 441, 91 N. E. 2d at page 880. It would not be a long step from this for the Court of Appeals to reason, despite the constitutional fears of McMaster v. Gould, supra, that if a non-resident enters New York and is personally served with process there, he likewise shall be deemed to have "consented" that his administrator should be subject to jurisdiction as the decedent was; and, as pointed out above, the words of § 8 of the Civil Practice Act are already adequate to that end.

A further ground of distinction is that the statements in Guaranty Trust Co. of New York v. York related to action by a Federal court in the absence of Federal legislation directed to the point. This was the situation also in Angel v. Bullington, 1947, 330 U. S. 183, 67 S. Ct. 657, 91 L. Ed. 832, so far as relevant, as Woods v. Interstate Realty Co., 1949, 337 U. S. 535, 69 S. Ct. 1235, 93 L. Ed. 1524, and as the Court read Fed. R. Civ. Proc. 23(b), in Cohen v. Beneficial Industrial Loan Corp., 1949, 337 U. S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528. Bernhardt v. Polygraphic Co. of America, 1956, 350 U. S. 198, 76 S. Ct. 273, 100 L. Ed. 199, did concern a Federal statute, but the decision went only so far as to read the statute narrowly to avoid a constitutional issue, a solution which the history of Fed. R. Civ. Proc. 23(a)(4) makes unavailable here. Cf. Robert Lawrence Co. v. Devonshire Fabrics, supra. Of the decisions holding state to override Federal procedural law, only Ragan v. Merchants Transfer & Warehouse Co., 1949, 337 U. S. 530, 69 S. Ct.

1233, 1235, 93 L. Ed. 1520, seems in the same general area as the instant case; but there the Court was dealing with the express command of a state statute of limitations which "brought the cause of action to an end." The Court did not hold Fed. R. Civ. Proc. 3 to be invalid as prescribing a method for commencing a diversity suit in the Federal courts different from the state practice, but rather that the action taken under the Federal Rule, which was sufficient to start the suit, was not sufficient to toll a state statute of limitations that required more.

On the other hand, the Supreme Court has declined to direct a district court to apply a state procedural rule confiding decision to the judge alone, although "were 'outcome' the only consideration, a strong case might appear for saying that the federal court should follow the state practice." Byrd v. Blue Ridge Rural Electric Cooperative, 1958, 356 U. S. 525, 537, 78 S. Ct. 893, 900, 2 L. Ed. 2d 953. It has held that the Article III grant of Federal judicial power in "all Cases of admiralty and maritime Jurisdiction" enables a Federal rule to overcome "procedural niceties" of a state with respect to the beginning of a suit by an administrator. Levinson v. Deupree, 1953, 345 U. S. 648, 73 S. Ct. 914, 97 L. Ed. 1319. And, despite the careful reservation made in Deupree with respect to diversity cases, we find nothing in the language or history of the grant of Federal judicial power in the same Article III over controversies between "Citizens of different States," nothing in the early legislation applying that grant,[*] and no actual decision of the Su-

[*] Both the 11th section of the Judiciary Act of 1789, 1 Stat. 92 and section 2 of the Process Act of 1792, 1 Stat. 275, which, subject to all actions at law, including the large class where Federal jurisdiction rested on diversity of citizenship, enjoined cases where acts of Con-

prême Court that would compel a conclusion that Congress lacks power to establish uniform rules of revivor for the Federal courts "in all suits of a civil nature" including those based on diversity of citizenship, even though this may result in a particular plaintiff or defendant obtaining better or worse treatment in the Federal than in the state court. We are dealing with a subject-matter which, though "outcome determinative" has long been regarded as procedural by lawyers, by legislators and by the Supreme Court itself. Baltimore & Ohio R. Co. v. Joy, supra. We believe revivor falls in what Judge Magruder called, although, to be sure, before Guaranty Trust Co. of New York v. York, "a twilight zone * * * where a rational classification would be made either way, and where Congress directly, or the Supreme Court under the authority of the Act of June 19, 1934, 48 Stat. 1064, 28 U. S. C. A. §723b, 723c, would have power to prescribe a so-called rule of procedure for the federal courts." Sampson v. Channell, 1 Cir., 110 F. 2d 754, 756 757, 128 A. L. R. 394, certiorari denied 1940, 310 U. S. 650, 60 S. Ct. 1099, 84 L. Ed. 1415. Our holding is only that in this limited area Congress may use its power to "provide for service of process anywhere in the United States" in such a manner that in all suits properly in the Federal courts by or against United States citizens, including diversity suits, substitution of their personal representatives may be had on their decease. This is an area where the posi-

gress "otherwise require or provide". On the best of grounds the Supreme Court has recognized the first Judiciary Act to be "entitled to deference and weight as a contemporaneous exposition" of the Constitution. State of Wisconsin v. Pelican Ins. Co., 1888, 127 U. S. 265, 297, 8 S. Ct. 1370, 1378, 32 L. Ed. 239. See Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49 (1923).

tive inference from Article III and the "necessary and proper" clause outweighs the negative inference from the limited grant of legislative power in Article I, § 8, and the Tenth Amendment that must have afforded the basis for the constitutional precept of Erie.[8]

IV.

Plaintiffs are not precluded from effecting substitution under F. R. Civ. Proc. 25(a) (1) because of their failure to act within the two-year time limit there provided.

If we are right in what has been said up to this point, an order substituting Waterson's administratrix here would have been proper, despite the contrary practice in the New York courts, if substitution had been effected within the two-year period prescribed by F. R. Civ. Proc. 25(a) (1). However, this was not done, for reasons stated at the outset. The District Court overcame this by holding, on the authority of Perry v. Allen, 5 Cir., 1956, 229 F. 2d 107,[9] that as a result of the 1948 repeal of 28 U. S. C. § 778 the two-year limitation in Rule 25 (a) (1) was

[8] For whatever importance it may have, it would seem highly unlikely that differences in Federal and state rules as to revivor would lead to the kind of forum-shopping of which Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab Co., 1928, 276 U. S. 518, 48 S. Ct. 404, 72 L. Ed. 681, cited by Mr. Justice Brandeis in Erie, 304 U. S. at page 74, 58 S. Ct. at page 819, 82 L. Ed. 1488, was so extreme an example, and which is likely also to occur where statutes of limitations are concerned as in Guaranty Trust Co. of New York v. York.

[9] This decision relied heavily on the views expressed in Professor Moore, 4 Federal Practice, ¶ 25.04, at 322-24.

no longer valid since it abridges a substantive right and thus offends the Enabling Act.[7]

[4] (1) For reasons indicated above, we are not inclined to give significance to the repeal of 28 U. S. C. 778 by the Revision Act. Moreover, with all respect to the judges of the Fifth Circuit, we find no sufficient reason for a view that although the substitution of the personal representative of a decedent is a matter of procedure within the Enabling Act, the placing of a time limit upon this is not. The courts of Colorado and Delaware have held that court prescribed rules similar to Rule 25(a) (1) placing a two year limit upon the substitution of the personal representative of a decedent concern procedure and are within the rule making power. Film Enterprises v. Selected Pictures, 1957, 134 Colo. 451, 306 P. 2d 252; Tiffany v. O'Toole Realty Co., Del. Super. Ct. 1959, 153 A. 2d 195. Moreover, whatever might be held where revivor was sought after two years against the personal representatives of a resident decedent in the district court of a state allowing a longer period, we can see

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[7] The District Courts in this circuit have divided as to the continued validity of the two year limitation in Fed. R. Civ. Pro. 25 (a) (1). Judge Noonan in the instant case and Judge Bruchhausen in Hendrix v. Sims, D. C. E. D. N. Y. 1958, 22 F. R. D. 10 have followed Perry v. Allen. Judge Weinfeld in Foltz v. Moore-McCormack Lines, Inc., 194 F. R. D. 302, D. C. S. D. N. Y. 1960, and Judge Herlands in Gertler v. United States, D. C. S. D. N. Y. 1955, 18 F. R. D. 407 have rejected it. The decisions by Judges Bruchhausen, Weinfeld and Herlands did not involve revivor against foreign personal representatives. We do not find the decision in Valley Brush Corporation v. Schaffer, 2 Cir. 1958, 256 F. 2d 681, cert. denied, as intimating either agreement or disagreement with Perry v. Allen by this Court. Well reasoned law review comments have criticized Perry v. Allen, 45 Cal. L. Rev. 795, 70 Harv. L. Rev. 1471, 105 U. Pa. L. Rev. 1098, 43 Va. L. Rev. 441.

no basis for holding in this case that the application of a time limit in the very Federal Rule that alone permits the substitution of a foreign personal representative could deprive plaintiffs of any rights. In our view, therefore, the order of substitution can be sustained only if plaintiffs may be treated as if they had met the two-year limitation because a court will not allow defendant to claim the contrary.

[5] (2) There are weighty indications that no consideration can ever be given to estoppel where there has been failure to comply with the two-year limitation of Fed. R. Civ. Proc. 25(a). These begin with Anderson v. Yungkau, 1947, 329 U. S. 482, 67 S. Ct. 428, 429, 91 L. Ed. 436, which held that Fed. R. Civ. Proc. 6(b), permitting the court to allow an "act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect," did not apply to Fed. R. Civ. Proc. 25(a) (1) and therefore forbade substitution after the two-year period although it was stipulated that plaintiff had not been lacking in diligence. Next is the amendment of F. R. 6(b) on December 27, 1946, adding Rule 25 as a rule specifically excepted from its operation, in the face of a recommendation from the Advisory Committee that the courts should have power to extend the two-year period of Rule 25(a) (1) on a showing of reasonable excuse. 4 Moore, Federal Practice, ¶25.01 [3], 564 fn. There is also the Supreme Court's failure to adopt the recommendation of the Advisory Committee in its report of October 1955 for the deletion of the two-year provision of Rule 25(a) (1) in favor of a rule that the action might be dismissed as to a deceased party if substitution were not made within a reasonable time. Most important of all is the statement, in Snyder v.

Buck, 1950, 340 U. S. 15, 19, 71 S. Ct. 93, 96, 95 L. Ed. 15, that the six months' time limit for substitution prescribed by 43 Stat. 936, 941, the statutory predecessor of Fed. R. Civ. Proc. 25(d), relating to continuation of suits against public officers "was a declared policy of Congress not to be altered by agreement of the parties or by some theory of estoppel." See Poindexter v. Folsom, 3 Cir., 1957, 242 F. 2d 516, applying this to Rule 25(d).

Impressive as these indications are, there are substantial points of distinction. In Anderson the Supreme Court was concerned with excusable neglect, not with estoppel. The 1946 amendment of Rule 6(b) and the rejected amendment of Rule 25(a) (1) were before the Court while Anderson was pending; the former simply codified the forthcoming decision in Anderson and the latter would have gone far beyond estoppel. The non-adoption of the Advisors' 1955 recommendation shows at most that the Supreme Court preferred a specific to an indefinite time-limit. Snyder v. Buck arose under 11 of the Judiciary Act of 1925, 43 Stat. 936, 941, relating to the continuation of suits concerning the discharge of official duties of an officer of the United States after he had ceased to hold office. As the Court pointed out (340 U. S. at page 18, 71 S. Ct. at page 95), such suits relate only "to a duty attaching to the office" which "existed * * * only so long as the office was held," and as to which the successor might well take a different view. For many year it had been held that such actions abated when the official died or retired, and the Act of 1925 was less liberal in preserving them than the previous Act of 1899, 30 Stat. 822. Moreover, the only penalty for failure to make timely substitution is the

need for starting a new action if, in fact, the successor continues the conduct complained of; service of process in a new suit against a government officer is never a problem.

Despite these distinctions, we would nevertheless feel constrained to follow the indications thus summarized if there were not also authority to the contrary. In Bush v. Remington Rand, Inc., 2 Cir., 1954, 213 F. 2d 456, 462-465, relying on the analogy that a statute of limitations can be waived, we held that long continued litigation with knowledge of plaintiff's death estopped a defendant from taking advantage of the two-year limitation of F. R. 25(a)(1), although counsel of distinction pressed upon us and upon the Supreme Court in a petition for certiorari, denied in 1954, 348 U. S. 861, 75 S. Ct. 85, 99 L. Ed. 679, that this was in direct conflict with Anderson v. Yungkau and Snyder v. Buck. And the principle that estoppel may prevent a defendant from invoking even a most strongly worded limitation received authoritative affirmation when the Supreme Court, at the last term, estopped a defendant from invoking the direction of § 6 of the Federal Employers' Liability Act, 45 U. S. C. A. § 56, that "no action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." Glus v. Brooklyn Eastern District Terminal, 1959, 359 U. S. 231, 79 S. Ct. 760, 761, 3 L. Ed. 2d 770.*

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* The Courts of Appeals had divided on this question. In addition to our own decision in Glus, 2 Cir., 253 F. 2d 987, which the Supreme Court reversed, the Third Circuit had held that the three year period of 45 U. S. C. A. § 56, could be "recalled even by fraud or concealment." Damiano v. Pennsylvania R. R., 3 Cir., 161 F. 2d 584, certiorari denied 1947, 332 U. S. 761, 68 S. Ct. 92, 92 L. Ed. 348. The Fourth Circuit had held the contrary. Scarborough v. Atlantic Coast Line R. R. Co., 4 Cir., 1949, 178 F. 2d 25, 11 A. L. R. 2d 591, certiorari denied 1950, 339 U. S. 919, 70 S. Ct. 671, 94 L. Ed. 1343.

The Court based its decision on "the maxim that no man may take advantage of his own wrong," a principle "deeply rooted in our jurisprudence" which "has frequently been employed to bar inequitable reliance on statute of limitations." Id., 359 U. S. at pages 332-333, 79 S. Ct. at page 762. If there be differences in the degree of the imperative in 45 U. S. C. A. 56 and in Rule 25(a)(1), our microscope is not powerful enough to perceive them. Finding the authorities thus inconclusive and believing our decision in Bush v. Remington Rand to be sound in principle, we adhere to it.

[6-8] (3) The final problem is whether this is a proper case for estoppel. Appellant points out that in Bush the estoppel was applied against the live party whereas here it is invoked against the dead one, and relies on the general rule that an agent's authority is revoked by the principal's death. While we recognize the distinction, we do not think it calls for a difference in result. We need not go so far as to hold that an attorney appearing in the courts of this Circuit is under a duty to keep himself and his adversary informed of his continued authority at all times. We do hold that an attorney so appearing must assure himself of the continued existence of his client before he takes affirmative steps in the client's behalf; that, in the absence of knowledge to the contrary, his adversary may properly assume he has done this; that a client who authorizes an attorney to represent him has impliedly so informed the adverse party; and that no advantage may be taken by the client's personal representative of the attorney's failure to ascertain the fact of the client's death. The Supreme Court of Pennsylvania has so held. It said in In re Hoopes'

Estate, 1898, 185 Pa. 167, 39 A. 840, 841, that "No advantage can be taken of the failure to suggest death and have substitution made." And it has reaffirmed this in In re Stewart's Estate, 1948, 358 Pa. 434, 58 A. 2d 42, in an opinion by Mr. (now Chief) Justice Jones. Compare Williams v. United States, 6 Cir., 1959, 264 F. 2d 227 and Pfeffer v. Commissioner, 2 Cir., 272 F. 2d 383. Hart v. Blakey, 1941, 286 N. Y. 75, 35 N. E. 2d 657, is not to the contrary, since there the proceedings subsequent to death had not created any prejudice. We recognize there are grounds on which the Pennsylvania decisions could be distinguished but, in the absence of controlling authority to the contrary, we prefer to follow them. We do this the more readily since the general law of agency appears to be moving in this direction (compare Restatement of Agency 120 (1933) with Restatement of Agency 2d 120 & comment (1958); see also Wis. Stat. 243.06 (1955)), and since there is much to suggest that the attorney who appeared for the decedent was in fact retained by and is representing someone very much alive.[*]

Order affirmed.

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[*] Appellees' brief states (p. 9), "It does not require much thought to realize that Waterson must have been the beneficiary of a liability insurance policy with an insurance company represented by John E. Morris." Appellee's reply brief in lieu thereof says to state that Morris and Waterson were "not on terms of social contact or acquaintance" (p. 5). The provisions of 39 N. J. Stat. 6:20 as to compulsory provisions in foreign motor vehicle liability policies for direct action by a judgment creditor against an insurer, along with the fact that Waterson seems not to have had enough assets to warrant general administration in New Jersey, may afford a clue to this one very deep mystery.

Appendix B

Opinion—Bush v. Remington Rand

Gibson, District Judge.

There are two actions of contract brought (a) by two daughters, Isabel Dysart Bush and Dorothy Dysart Fellers, and one son, Samuel Clayton Dysart, of Birney Dysart, against Remington Rand, Incorporated; and (b) by one daughter Isabel Dysart Bush, Administratrix d. b. n., c. t. a. of estate of Birney Dysart, against the same defendant. The gist of the action, in each case, is identical. Henceforth, except as to one alleged error, the term "plaintiff" will be used to denote all the plaintiffs in the combined actions.

The plaintiff's complaint contained two counts. It alleged, in its first count, the following: Birney Dysart, on or about December 25, 1919, invented an automatic credit balance device to be used in connection with, and as part of, adding, bookkeeping or other business machines.

Sometime between November, 1923, and May, 1924, Birney Dysart, the owner of this invention and the applicant for a patent thereon, agreed with the Dalton Adding Machine Co. of Norwood, Ohio, that the Dalton Co., pending the issuance of letters patent upon this invention, might use it, for a consideration to be agreed upon within a reasonable time after the issuance of letters patent, and the Dalton Co. further agreed, as part consideration for its use, to pay all costs relative to the issuance of the patent.

On or about May 9, 1927, the defendant purchased all assets and assumed all liabilities, immediate or contingent, of the Dalton Co. The Dalton Co. paid charges and costs

relative to the issuance of the patent until its purchase by defendant. The defendant has, since its purchase of Dalton Co., paid none of the charges or costs of obtaining the patent. Letters patent on the invention were issued on September 17, 1935.

Since September, 1924, the Dalton Co. and the defendant used this invention in the manufacture of, and as part of, a large number of adding, bookkeeping and other business machines. Yet since the issuance of the patent, the defendant has made no attempt to agree with Birney Dysart, his representative, or his heirs (the plaintiffs) concerning compensation for such use, for which compensation was asked in the first count.

The second count asked for an accounting and disclosure of the number of machines sold by the Dalton Co. and defendant which were equipped with this invention and manufactured and sold by the Dalton Co. and defendant, and asked for judgment for the amount found due on such accounting.

This complaint was dated November 8, 1937, and was entered in the Superior Court at Hartford, Connecticut. On motion of the defendant, the action on December 22, 1937, was removed to the Federal Court. After sundry motions, to expunge, to strike, the defendant filed, on November 1, 1938, its answer. This answer contained a general denial and twelve special defenses. After further motions and hearings thereon, on March 8, 1940, the special defenses were boiled down to those of shop right, license, legal or equitable title, fraud and estoppel.[1]

[1] Earlier phases of this action may be found at D. C., 25 F. Supp. 293; D. C., 31 F. Supp. 296; D. C., 32 F. Supp. 477; D. C., 40 F. Supp. 596.

Appendix B

Both parties finally having agreed to trial by court, trial was had before Judge Clark commencing April 28, 1941. On July 11, 1941, Findings of Fact and a Memorandum of Law were filed in favor of the plaintiffs. Dysart v. Remington Rand, Inc., D. C., 40 F. Supp. 596. Liability to the plaintiff was predicated on an express promise on the part of the Dalton Co., assumed by the defendant when it merged with the Dalton Co., to pay the reasonable value for the use of the Dysart device. Accordingly, on July 18, 1941, an interlocutory judgment was entered. This interlocutory judgment ordered the defendant to account to the plaintiff for the reasonable value of the use of the patent made by it and the Dalton Co. and referred the case to a Special Master to ascertain the extent of such use, the reasonable value thereof, and the amounts due each of the plaintiffs and awarded costs to the plaintiff.

On October 2, 1941, Charles M. Lyman, Esquire, was appointed Master. Apparently it took the parties a great deal of time to gather together all the necessary factual data because it was not until early in 1949 that hearings on the merits were held before the Master, and these continued until mid June of that year. The Special Master's first report was dated December 17, 1949. All parties filed exceptions to the first report of the Master and, after a lengthy hearing, Judge Smith, on July 10, 1951, recommitted the matter to the Master to make additional findings and corrections in the report.

On December 8, 1951, the Supplementary Report of the Special Master was signed. Objections were filed and a Second Supplementary Report was signed by the Master on April 4, 1952. Objections to the reports filed in the

Appendix B

District Court were overruled on June 26, 1952, and on July 21, 1952, judgment was entered in favor of the plaintiff to the following effect:

Isabel D. Bush, as Administratrix d.b.n. c.t.a. of the Estate of Birney Dysart	$142,717.91
Isabel D. Bush	359,094.36
Dorothy D. Fellers	359,094.36
Samuel C. Dysart	359,094.36

Costs were awarded the plaintiff.

It is from this judgment that defendant appeals. We have gone into the history of this case at some length since more than sixteen years have elapsed since the commencement of this action. We have not attempted to enumerate the nearly countless motions that have been filed and contested. Suffice it to say, the record indicates that this action has been staunchly contested every inch of its way. And it will be necessary, in discussing the defendant's contentions, to consider in detail certain other historical aspects of this case.

The first error assigned by the appellant is that the plaintiffs are estopped from prevailing in this action because of Birney Dysart's alleged misrepresentations at the time of the merger of the Dalton Co. with the defendant, and his failure to disclose his agreement with the Dalton Co. and his then pending patent application.

1, 2. In considering this claim of error, we are governed by two principles: first, we must sustain Judge Clark's finding that there was neither actual nor imputable

fraud if there is any substantial evidence in support thereof. United States v. Aluminum Co. of America, 2 Cir., 148 F. 2d 416, 433; Rule 52, Federal Rules of Civil Procedure, 28 U. S. C. A. Such inferences as the Trial Judge drew in this matter are not binding upon us, but they are entitled to substantial weight and, so far as reasonable, should be given effect here. United States v. Fotopulos, 9 Cir., 180 F. 2d 631; Rule 52, Federal Rules of Civil Procedure.

[3, 4] In addition, the defense of estoppel by fraud is an affirmative defense. The defendant had the burden of proving that Birney Dysart was guilty of all of the elements of fraud. Rule 8(c) of Federal Rules of Civil Procedure.

[5] Guided by these principles, it is clear there was no error by the Trial Court in denying the defendant's contention as to estoppel by fraud.

Defendant's argument therein is two-fold. It first charges that the report of the auditors stating that "No contingent liabilities were reported to nor disclosed by us during the course of our examination and a responsible official of the Company certified to us that none existed at December 31, 1926," was an affirmative misrepresentation on the part of Dysart, since he was the Treasurer and the one who signed the financial statements underlying this report.

[6] The Trial Court found as follows:

> "On February 21, 1927, as secretary of the Dalton Company, Dysart signed several certifications

on forms presented to him by Ernst & Ernst, accountants engaged in making an audit report of the Dalton Company as of December 31, 1926. These certifications were as to the inventory, accounts receivable, liabilities, and purchase and sale commitments of the company; that one which dealt with liabilities stated that to the best of the certifier's knowledge and belief provision had been made on the books of account for all liabilities except certain invoices noted, and that the company was not liable as endorser or guarantor on any accommodation paper, contract, or agreement, had not pledged or assigned any of its assets, had no outstanding contracts of a speculative nature for material or other items; had no damage or losses on account of discounted notes, trade acceptances or other forms of obligation." These certifications were not brought to the attention of defendant's officers, but Ernst & Ernst's audit report, which came to their attention a few days after March 2, 1927, stated that no contingent liabilities were reported to or disclosed by them during their examination, and a responsible official of the Company certified to us that none existed at December 31, 1926." At that time (about March 5, 1927) all arrangements for the sale had been completed, and in the agreement of February 14, 1927, no reference had been made to contingent liabilities in the pro forma balance sheets or elsewhere. In making the purchase of the Dalton assets, defendant was interested in Dalton's favorable income showing and strong patent situation, and did not know of or rely on these certifications made by Dysart."[2]

[2] Dysart v. Remington Rand Inc., 73 F. (2d) [illegible] Supp. 508.

Appendix B

Assuming but not deciding that the statements on the certifications described in Finding 10 which were signed by Dysart amounted to a misrepresentation, it is still necessary in order to have an estoppel by fraud, to find either an intent to defraud or to find that Dysart's act was so grossly negligent as to amount to fraud. Compare O'Connor v. Lidlam, 2 Cir., 92 F. 2d 50, 53, certiorari denied 302 U. S. 758, 58 S. Ct. 364, 82 L. Ed. 586. The Trial Judge found neither actual nor inferential fraud. Certainly the facts found by the trier are adequately supported by the evidence. The inferences drawn by the trier are to be given substantial weight.

[7, 8] A fundamental essential to a valid defense of fraud is that the defendant must show that it relied on the alleged misrepresentation. General Finance Corp. v. Keystone Credit Corp., 4 Cir., 30 F. 2d 872, 881. The burden was on the defendant to prove that element. Judge Clark found, in the last sentence of Finding 19, noted above, that defendant did not know of or rely on these certifications made by Dysart. Such a finding is warranted from the evidence.

Furthermore, it is far from clear that the statement to the auditors had been correctly interpreted by them to mean that there were no contingent liabilities. There was no certainty at the time of the merger early in 1927, that letters patent would ever issue on this invention. There is a difference between a contingent liability and a plain "contingency." "A contingent liability is one thing, a contingency, the happening of which may bring into existence a liability, is another, and a very different thing. In the former case there is a liability which will become absolute upon the happening of a certain event;

in the latter there is none until the event happens. The difference is simply that which exists between a conditional debt or liability and none at all." Fernald v. Johnson, 71 Me. 437, 440. Certainly we cannot find that defendant sustained the burden of proving it relied on these statements in making the deal of merger. The burden being on the defendant on this question we cannot find it has sustained it.

Nor do we find any substance to the defendant's contention that Dysart's silence constituted an estoppel by fraud. The situation in which Dysart acted is clear enough. Although he was Treasurer of the Dalton Co., he had no part in the negotiations with Rand. He was not consulted. He knew that Landsiedel, then President of the Dalton Co. and who alone carried on the negotiations for the Dalton Co. with Rand, knew about his contract with the Dalton Co.

[9] To be charged with estoppel by silence, Dysart must have been under a duty to speak or to have known that the defendant was acting under a mistaken belief. Sinclair Prairie Oil Co. v. Campbell et ux., 5 Cir., 164 F. 2d 907, 910.

[10] Since he was not a party to the negotiations, or in any way in a fiduciary relationship with Remington Rand, he had no duty to speak. He had every right to rely on Landsiedel's duty of disclosure. Nor is there an iota of evidence either to indicate that Dysart knew the defendant was ignorant of Dysart's rights in his patent or that the defendant was acting under a mistaken belief. And the burden was on the defendant to show any such situation.

Appendix B

[11] The second point urged by the defendant is that recovery is barred by the Connecticut three-year or six-year statutes of limitations governing oral contracts. This contention is easily disposed of, as Judge Clark found,[1] that the issuance of the patent was an absolute condition to liability under the contract. Thus the cause of action did not arise until that contingency was fulfilled and as such, any statute of limitations could not begin to run until such time. Since the patent did not issue until September 17, 1935 less than three years before the commencement of this action in November, 1937 the action is not barred by either the three or six-year limitation.

[12-14] The defendant's claim that the plaintiffs unequivocally accepted the claimed repudiation in 1934, when they granted a license to Underwood Elliott Fisher and thereby rendered themselves incapable of performing the Dysart Dalton Co. agreement, is equally untenable.

The contract as found by Judge Clark in Finding 5[1] did not provide that Dysart should be in a position to assign complete rights in the patent to the Dalton Co. The Dalton Co. contracted to pay Dysart the fair value, to be agreed upon, for the use of the patent. There was no provision in the contract to assign the patent when

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[1] "* * * When the Dalton Company sought to make use of the invention in 1934 the president and general manager thereof, Louis E. Dalton, the dominant factor in the management of the company and with his family the chief stockholder, agreed with Dysart that the company should use the invention and that the company would compensate Dysart for the use when its value became ascertained after issuance of the patent for it." * * * Dysart v. Remington Rand, Inc., D. C., 40 F. Supp. 596, 597.

[1] See Footnote 3, supra.

issued. Intention is an inference of fact for the trier, and his conclusion is not reviewable unless it was one he could not reasonably make. U. S. v. Yellow Cab Co., 338 U. S. 338, 70 S. Ct. 177, 94 L. Ed. 150; McDermott v. McDermott, 97 Conn. 31, 34-35, 115 A. 638; Finley v. Swirsky, 98 Conn. 666, 671, 120 A. 361. Indeed the trial judge was fully justified in finding the contract as he did.

Defendant's next claim concerns Rule 25(a) of the Federal Rules of Civil Procedure which directs dismissal of an action as to a deceased party if proper substitution for the party is not made within two years. The rule is sought to be invoked against the interests represented by the wife of the inventor Birney Dysart, Mrs. Eva Perin Dysart, at the time she died on December 30, 1943. She was then a party to the proceedings in two capacities. As Executrix of the estate of Birney Dysart, who died on July 20, 1932, she was the sole plaintiff in the action to recover the reasonable value of the use up to August 8, 1933, the date when Dysart's estate was distributed. In the second action brought to recover the value of the use after August 8, 1933, she was party plaintiff to the extent of a one-quarter interest in the recovery. Although sole legatee of Dysart's estate, in 1935 she had transferred a three-quarter interest in equal parts to her three children, who were also plaintiffs in this second action.

Within the two-year period after Mrs. Dysart's death in 1943, no effort was made to substitute for her interests, and on March 27, 1947, her estate was fully settled and distributed to the three children, full state and federal tax liability having been paid. Over four years after

her death, on January 11, 1949, hearings on the merits before the Special Master were commenced. Her death was suggested on the record on January 19, 1949, and the hearings terminated on June 17, 1949. Although defendant had knowledge of Mrs. Dysart's death as early as 1946, no attempt was made to raise the issue of no substitution until defendant filed its original brief before the Master on July 25, 1949, after the completion of the hearings. Not until January 31, 1950, was a motion made in the District Court under Rule 25(a) to dismiss the actions as to her, both as Executrix and individually. The Special Master found little merit in the defendant's arguments, and Judge Smith, in his memorandum on the Master's report filed July 10, 1951, denied the motion to dismiss. He found that failure to substitute in the second action was not fatal, since under the distribution of Mrs. Dysart's estate in April, 1947, full legal title to the claim against the defendant passed to the children, and the children were already parties to the action. However, as to the first cause of action in behalf of Birney Dysart in which Mrs. Dysart was the sole representative, he found that since inventories of his estate listed the claim as late as 1949, and taxes remained to be settled and paid, the claim still reposed in the estate. Thus legal title rested with the personal representative of the estate and only such a representative was the proper party to enforce the action. Butler v. Sisson, 849 Conn. 580; Lynch v. Skelly, 138 Conn. 376, 379, 85 A. 2d 251. Since the personal representative had not been made a party, dismissal under Rule 25(a) would ordinarily follow, but he found that the defendant, by its long delay in raising the issue, had waived its right to object and was estopped from invoking the rule. Thus, pursuant to Federal Rule

21, which permits the District Court to add or drop parties at any stage of the proceeding on such terms as are just, be allowed the daughter Isabel D. Bush, Administratrix d.b.n.-c.t.a. of the estate of Birney Dysart under Probate Court decree of August 16, 1949, to be added as party plaintiff in the first action.

[15] We can see no error in this decision. The defendant knew of Mrs. Dysart's death as early as 1946, and if objection had been made at least prior to the hearings in 1949, those proceedings would have been greatly simplified and much time and expense would have been saved. Having stood by while the plaintiffs expended money and effort in bringing the case to judgment, the defendant should no longer be allowed to object. The defendant, in disputing this decision, relies on Anderson v. Yungkau, 329 U. S. 482, 67 S. Ct. 428, 91 L. Ed. 436, where, in a suit to recover certain stock assessments, the Court ruled that dismissal under Rule 25(a) after two years was mandatory. Although the failure to substitute was due to no lack of diligence on the part of the plaintiff-receiver, the Court held that there was no power, under the excusable neglect provision of Rule 6(b), to extend the time within which the executors of some of the defendant stockholders who had died could be substituted. On the basis of this decision, the defendant argues that Rule 25(a) is jurisdictional; that the operation of the Rule cannot be waived by conduct of the parties.

[16, 17] However, we do not think the Yungkau case is controlling here where the issue is not discretion of the Trial Court but waiver by the parties. In ruling that dismissal was mandatory, the Court characterized Rule

25(a) as a type of statute of limitations. See 329 U. S. at page 485, 67 S. Ct. 428. Moreover, in that decision Rule 25(a) was used to protect the repose of the estate of the defendant, but here it is being used only to bar the plaintiff's immediate remedy. As such, it more clearly appears to take the form of a limitation statute. This characterization seems even more realistic, as neither the plaintiff's right nor remedy would be barred under Connecticut law if we dismissed, Conn. Gen. Stat., Sec. 8337, and plaintiff could institute a new suit within one year of our dismissal. Conn. Gen. Stat., Sec. 8332. A statute of limitations can be waived, Matheny v. Porter, 10 Cir., 158 F. 2d 478, 479, and we think defendant clearly has done so here. A contrary result would not only prolong the litigation but defeat the purpose of Rule 25(a), as the closing of the estate of Birney Dysart would be interminably delayed. We are of the opinion that neither Rule 25(a) nor the Yungkau case forces us to condone such a result.

The appellant's final claim of error is that the Special Master's computation of the "reasonable value" of the use of the invention was grossly excessive. The appellant first claims that the District Court and Special Master erred in refusing to consider and not give effect to proof that plaintiff, in 1934, granted a non-exclusive unrestricted license for the full life of the Dysart patent to Underwood Elliott Fisher for $100,000.

We want to note right here that the appellant originally claimed that this $100,000 figure paid by Underwood for a license was too high for use by the Special Master. On the contrary, its entire case initially was based on the claim that the "value of the use of the Dysart device"

to it should be determined solely on defendant's showing of profits, or lack thereof.

It was only after the Special Master recommended an award well in excess of $100,000 that the defendant went into a tailspin—reversed itself—and petitioned to reopen the hearings to present evidence of other licenses granted by Mrs. Dysart.

The Special Master denied this motion on the ground that the $100,000 figure was a price fixed in settlement and was not a true mirror of worth. He also found that any other licenses granted could not represent dealings in the open market because of "the cloud thrown on plaintiff's title by defendant's claim. These rulings were affirmed by Judge Smith, who also, on remand, directed the Master to take into consideration the effect competition resulting from these licenses might have on the value of the defendant's use.

[18] In these rulings, there was no error. A contract made in settlement of litigation is inadmissible as evidence of value. Activated Sludge, Inc. v. Sanitary District of Chicago, D. C., 64 F. Supp. 25, 33, affirmed 7 Cir., 157 F. 2d 517, certiorari denied 330 U. S. 834, 67 S. Ct. 970, 91 L. Ed. 1281.

On February 19, 1931, an interference suit against the then pending Dysart patent was filed by a Mr. Sundstrand. This action was sponsored by Underwood Elliott Fisher, owner of the Sundstrand interests. It was decided in plaintiff's favor in 1934, and the license agreement between plaintiff and Underwood Elliott Fisher was part of the settlement of that litigation.

[1] Transcript of Record, Page 1-4

Appendix B

Furthermore, such licenses as were granted, were granted when this litigation was an element which had to be taken into account. It could not help but make prospective licensees so cautious that such license fees would not be apt to reflect fair value.

[19] Appellant claims that the District Court and Special Master erred in awarding plaintiff a greater sum than the reasonable value of the non-exclusive use of the Dysart device. But it is true that determination of damages involving misuse of a patent is a question of fact for the trier. National Car-Brake Shoe Co. v. Terre Haute Car Co., C. C. Ind., 19 F. 514. Reynolds Spring Co. v. L. A. Young Industries, 6 Cir., 101 F. 2d 257, 261. We cannot read the statement of the Special Master regarding royalty rates in the same manner as the defendant does in its brief. We are satisfied that the District Judge properly resubmitted the matter to the Special Master with instructions to reconsider his findings to determine the reasonable value on the basis of actual experience for the entire period from 1924 to the close of the hearings "to make plaintiffs whole for the damages suffered by them from the breach of contract, implied in fact to start paying within a reasonable time after the issuance of the patent, and to continue to pay, thereaffter, the reasonable value of the use."

Thereafter, plaintiff introduced four witnesses who testified as to a reasonable royalty rate. They supplied ample basis for the findings as made. It should also be remarked that the defendant produced no witnesses on this point.

Appendix B

The defendant also claims that the Special Master and District Court erred in including the value of the Dreher mechanism, which, it claims, is entirely distinct and different from the Dysart device, in the calculation of damages for the use of the Dysart device in tabulating machines.

[20] This claim is easily disposed of. The Special Master found that the Dysart device represented the important part of the machine—that which made it sell and which gave the machine its enhanced value.[6] This finding was approved by the Court. Indeed, the evidence overwhelmingly supports this finding, and this Court cannot say in any way that this finding was clearly erroneous. Reynolds Spring Co. v. L. A. Young Industries, supra.

[21] The last of the errors claimed by defendant is that allowance of interest from 1936 was erroneous. However, we believe the interest as allowed should be upheld. The defendant has made devious and strenuous efforts to avoid this claim. Judge Smith says that "it would be difficult to find a more adequate showing of exceptional circumstances justifying the award of interest than that for the unlawful detention of the amounts due to Dysart's successors." In this we fully concur, and such interest is allowable in such circumstances under Connecticut law. Campbell v. Rockefeller, 134 Conn. 585, 591, 592, 59 A. 2d 524. We find no error as claimed by defendant.

[6] Transcript of Record, Page 169.

Appendix B

In this case, the plaintiff filed a cross-appeal claiming the Court erred in denying, in part, plaintiff's motion for costs.

The plaintiff objects to the disallowance of costs for expert services and witness fees for one person and one corporation. However, Judge Smith did not find that defendant's conduct during the hearings was dilatory or fraudulent.

[22, 23] The allowance of costs to the prevailing party is not a matter of absolute right; the Trial Court has inherent power to disallow a part, or all, of the costs in a case. Prudence Bonds Corp. v. Prudence Realization Corp., 2 Cir., 174 F. 2d 288.

There is no merit to the cross-appeal, and we do not disturb the action of the court below.

APPENDIX C

Opinion—Perry v. Allen

Cameron, Circuit Judge.

This appeal presents the question whether the Court below was required by Rule 25(a) (1) of the Federal Rules of Civil Procedure, 28 U.S.C.A., to dismiss the action brought by George M. Perry, Sr., Appellant, against the Collector of Internal Revenue, where the Collector died and W. Samuel Edwards, Administrator of his estate (appellee) was not substituted as a party within two years after the Collector's death. Appellant had filed suit for refund of a partial payment made by him of income taxes, assessed for the year 1944, and the Court below denied appellant's motion to substitute the administrator of the dead Collector's estate, and granted a motion by the administrator to dismiss the action on the ground that the administrator was not substituted within two years of the death under the requirements of Rule 25(a) F. R. C. P.[1] The Court's action was grounded upon its opinion that it was "mandatory upon the Court to deny the substitution after the expiration of the two year limitation."

The attorneys for the Government, appearing for the administrator, seek to support that decision with the contention that "Rule 25(a) operates both as a statute of limitations upon revivor and as a mandate to dismiss the action if not revived within the two year period, and its

[1] Appellant contends also that the Court below erred in denying his motion to make the United States a party defendant in lieu of the collector and in permitting the United States to dismiss its complaint filed as intervenor in the original action. This contention will be dealt with after the main issue is disposed of.

provisions are specific and admit of no variation." In their view the Supreme Court's decision in Anderson v. Yungkau, 1947, 329 U. S. 482, 67 S. Ct. 428, 91 L. Ed. 436, sustains this position completely.

Appellant, on the other hand, argues that the Rule is nothing but a rule of procedure and cannot be given the effect of a statute of limitations, and is invalid if construed as such; and that Yungkau was based upon a statute of limitations then in force but since repealed, and that the construction there placed upon the Rule was in reality the application of the statute as enforced by the Rule. We agree with appellant.

[1, 2] The terms of the Rule[2] are mandatory, but they merely tracked and made operative the provisions of the existing Statute of Limitations[3] which established the

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[2] Rule 25(a) (1) reads as follows:

> "If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party, and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district."

[3] The pertinent terms of this statute, 48 U. S. C. A. (1946) §778 (see 4 Moore's Federal Practice, p. 856), are these:

> "§778. Death of parties; substitution of executor or administrator. When either of the parties, whether plaintiff or petitioner, a defendant in any suit in any court of the United States, dies before final judgment the executor or administrator of such deceased party may, in case the cause of action

fixed limits which the Rule enforced. This statute applied to all parties and to all suits whether in equity, admiralty or law, and vested United States District Courts with jurisdiction to substitute fiduciaries only within two years from the date of the death of the party and provided the estate had not been settled and distribution made. It was within the competence of Congress to enact statutes of limitation applying to cases in the federal courts[4] as it was within the competence of state legislature to pass similar statutes effective within the respective states.[5]

When the Supreme Court enacted Rule 25(a) (1) there was, therefore, a Federal Statute of Limitation, and the Rule essayed merely to provide the means of enforcing it, mainly by providing substitution by motion rather than by the more cumbersome procedures of *scire facias*. When Yungkau was decided, the Statute was the law of

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survives by law prosecute or defend any such suit to final judgment * * * The provisions of this section shall apply to suits in equity and in admiralty as well as to suits at law, and the jurisdiction of all courts of the United States shall extend to and over executors and administrators of any party, who dies before final judgment or decree, appointed under the laws of any State or Territory of the United States, *and such courts shall have jurisdiction within two years from the date of the death of the party to the suit to issue the scire facias* to executors and administrators appointed in any State or Territory of the United States which may be served in any judicial district by the marshal thereof. No executor or administrator shall be made a party to any suit [illegible] *made before final settlement and distribution* of the estate of said deceased party to the suit." [Emphasis added.]

The provisions of the statute of laws extended to suits in equity by the Act of November 19, 1971.

[4] 54 Am Jur Limitation of Actions § 19, p. 20.

[5] Id. § 17, p. 20.

the land and the Supreme Court merely enforced its mandatory provisions. A reading of Yungkau[*] will reveal clearly that the Court was basing its decision upon the statute as the foundation of the Rule. Its language was directed to the Rule because the contention before it was that Rule 6(b) invested the Court below with discretion to relax the fixed limitations spelled out in Rule 25(a) (1).

The Court decided that the Rule required the dismissal of the action where substitution had not been made within the two year period. That was because the statute had vested in the District Court jurisdiction to permit the substitution only within two years. There is nothing in the language of the Supreme Court, and certainly nothing in the basic facts underlying it, justifying the argument that Rule 25(a) (1) would have been given the meaning and effect ascribed to it by appellee unless the Rule and the Statute were being applied as a unitary scheme, the Statute providing the substance and the Rule providing the mechanics.

But the Statute was repealed by the Revision Act of 1948 and, at the time the action before us was begun, there was no Federal Statute of Limitations. There

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[*] The conclusion announced by the Court upon which appellee relies, is based upon and circumscribed by this language which preceded it (320 U. S. 485, 67 S. Ct. 449):

> "Rule 25(a) (1) is based in part on 41 Stat. 353, 28 U. S. C. A. § 778, which *limited the power of substitution to two years from the death of a party.* * * * That *statute*, like other statutes of limitations, was a *statute of repose.* * * * That policy is reflected in Rule 25(a). * * * " [Emphasis supplied.]

have been no authoritative decisions since Yungkau,[7] and we are called upon to decide, without the aid of controlling precedents, the effect and validity of the Rule standing alone and without any statutory support.

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[7] Appellee cites Hoffheimer v. McIntee, 7 Cir., 1950, 179 F. 2d 789, certiorari denied Johnston v. McIntee, 340 U. S. 817, 71 S. Ct. 47, 95 L. Ed. 600, as sustaining his position. The case is inapplicable for several reasons, among them being that all of its proceedings related to the time before the repeal of 28 U. S. C. A. §778. He also relies upon our case of Theard v. Fidelity & Deposit Co. of Maryland, 5 Cir., 202 F. 2d 880. There, we merely conceded the correctness of eliminating from a bankruptcy petition a party who had died without substitution of her personal representative. The question now before us was not raised and was not considered because there were sufficient parties remaining to support the bankruptcy petition.

Appellant, in turn, relies on Bush v. Remington Rand, Inc., 2 Cir., 1954, 214 F. 2d 456. In that case the District Court declined to enforce the provisions of Rule 25(a)(1) as mandatory, on the ground that the point of timely substitution had been waived and the Court of Appeals affirmed. We do not consider the case as authority here.

[8] In Note 1 of Mr. Justice Rutledge's dissent in Yungkau, 339 U. S. 887, 67 S. Ct. 941, it is pointed out that the Notes of the Advisory Committee on the original Federal Rules state that Rule 25(a)(1) "is based upon Equity Rule 45, 28 U. S. C. A. §723 (Appendix 'Death of Party' Revised) and U. S. C. Title 28, §778, 28 U. S. C. A. §778 ('Death of parties—substitution of executor or administrator')." It is further pointed out that under Equity Rule 45 substitution of an administrator could be made within "a reasonable time."

Professor Moore in his work on Federal Practice, Vol. 4, p. 505 et seq., discusses fully the posture in which Rule 25(a)(1) is left since the repeal of the statute. He calls it (p. 510) "surely the poorest rule of all the Federal Rules," and wrestles at length with the question (p. 511) "Does the new Rule 25 prescribe an absolute time period within which substitution must be made, as it does in subdivision (c), and did it thereby supersede the provisions of a statute of limitations, and would the latter seem to be invalid as an improper invasion of the field of substantive rights?" And see also his comment as to the principles which he believes should govern (p. 524).

[3.5] We are unable to agree with the position of appellee that "Rule 25(a) operates * * * as a statute of limitations upon revivor * * *." A "statute" must, under well settled principles and as the word connotes, be the act of a legislative body.[9] The placing of an absolute time limit upon the assertion of a right goes to the substance of the right even though such an Act is catalogued as relating to remedy alone.[10] Such a limitation may be placed solely by the legislature and is beyond the competence of a court, exercising its power to formulate rules of procedure.

The Supreme Court spelled out its own concept of the rule making power many years before the steps culminating in F. R. C. P. had their inception. Washington Southern Navigation Co. v. Baltimore, etc. Steamboat Co., 1924, 263 U. S. 629, 635, 44 S. Ct. 220, 222, 68 L. Ed. 480:

> "The function of rules is to regulate the practice of the court and to facilitate the transaction of its business. This function embraces, among other things, the regulation of the forms, operation and effect of process; and the prescribing of forms, modes and *times for proceedings*. Most rules are merely a formulation of the previous practice of the courts. Occasionally a rule is employed to express, in convenient form, as applicable to certain classes of cases, a *principle of substantive*

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[9] In 4 and 5, supra.

[10] Berthel v. Stanim, 5 Cir., 1944, 145 F. 2d 487, 491. Holmberg v. Armbrecht, infra, 327 U. S. at page 394, 66 S. Ct. at page 585; and see 2 Moore's Federal Practice, p. 714 et seq.; 34 Am. Jur. Limitation of Actions, §§10, 11, 12, 15, 17, and 53 C. J. S. Limitations of Actions, §1, p. 200 et seq.

> *law which has been established by statute or decisions.* But no rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law. * * * "[13] [Emphasis added.]

The language of the Rule-Making Statute of 1934,[12] investing the Supreme Court with power to enact rules of procedure, contains a recitation of the categories which may be covered and a caveat as to those which may not:

> "The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States, * * *. Such rules shall not abridge, enlarge or modify any substantive right * * *."

[6] It is plain that these Rules are designed to provide the machinery for the administration of justice, the modes of proceeding by which legal rights are enforced; and do not purport to deal with the law which gives or defines such rights, or their character, or the existence or boundaries of the remedies vouchsafed for the establishment of those rights; and that the procedures they provide are only means to the end of achieving substantial justice and are not ends in themselves.

The Supreme Court has placed such an estimate on its rule-making power created by that Statute in Sibbach v. Wilson & Co., 1941, 312 U. S. 1, 10 et seq., 655, 61 S. Ct. 422, 424, 85 L. Ed. 479:

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[13] And see also General Electric Co. v. Marvel Rare Metals Co., 1932, 287 U. S. 430, 434, 53 S. Ct. 202, 77 L. Ed. 408.

[12] 28 U. S. C. A. §2072.

"Hence we conclude that the Act of June 19, 1934, was purposely restricted in its operation to matters of pleading and court practice and procedure.[5] Its two provisos or caveats emphasize this restriction.[6] The first is that the court shall not 'abridge, enlarge, nor modify the substantive rights', in the guise of regulating procedure. * * *

"The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. * * *"

[7] Under these tests, we hold that Rule 25(a) (1) is not a Statute of Limitations and is invalid insofar as it attempts to abridge appellant's substantive right to bring his civil action to trial on its merits, by placing a categorical and inflexible time limit upon his right to substitute the collector's administrator. Such an attempt is outside the mandate and inside the caveat of the Act of Congress.[13]

[8, 9] For the substantive law of limitations upon the right of substitution, we must look to the general law, federal or state, governing such matters. We are dealing here with a federal matter[14] and the applicable rule of limitations will be determined by the nature of appellant's

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[13] And cf. Baltimore & Ohio Railroad Co. v. [illegible], 1899, 173 U. S. 226, 19 S. Ct. 387, 43 L. Ed. 677 (cited in Yungkau, 339 U. S. at page 485, 67 S. Ct. at page 429), declaring that, in the absence of a Federal Statute, the right to revive against the personal representative of a decedent depends primarily upon state law.

[14] 28 U. S. C. A. §1340.

action, whether it belongs to law or to equity.[15] It is settled that a suit against the collector such as this one is equitable in its nature. "While a suit against a collector for the refund of taxes illegally paid is in the nature of an action for money had and received and therefore in form a law action, it is, nevertheless, governed by equitable principles."[16]

"Suits against collectors are maintainable on the theory of money had and received. In such suits the plaintiff may recover only such money as he is in equity entitled to recover, and as defendant is not entitled to retain."[17]

In Hartwell Mills v. Rose, 5 Cir., 1932, 61 F. 2d 441, 443, we said; "This is a suit for money had and received, equitable in its nature and grounds. It proceeds upon the principle that, where one person has received money or its equivalent under such circumstances as that ex aequo et bono it belongs to another, and that in equity and good conscience he ought not to retain it, he will not be allowed to do so. * * * In order to recover in such a case, plaintiff must show either upon substantial considerations equitable in their nature, or because plaintiff's case falls within some provision of the positive law * * * that defendant is withholding money to which plaintiff is entitled." Again, in Akers v. Seofield, 5 Cir., 1948, 167 F. 2d 718, 720, citing Supreme Court decisions.[18]

[15] Professor Moore discusses the whole question exhaustively in his treatise on Federal Practice, Vol. 2, §§407, pp. 714-727.

[16] 10 Mertens Law of Federal Income Taxation §5804, p. 505.

[17] Ib. §5874, p. 485.

[18] United States v. Jefferson Electric Mfg. Co., 291 U. S. 386, 54 S. Ct. 443, 78 L. Ed. 859, and Stone v. White, 301 U. S. 532, 57 S. Ct. 851, 81 L. Ed. 1265.

we said of a tax refund suit: "'This is often called an equitable action and is less restricted and fettered by technical rules and formalities than any other form of action.'"[19]

This being a federally-created right, equitable in nature, a recent decision of the Supreme Court of the United States furnishes the complete answer to the question of limitations, Holmberg v. Armbrecht, 1946, 327 U. S. 392, 66 S. Ct. 582, 90 L. Ed. 743.[20] The suit was in equity to enforce a federally-created right, and the Court of Appeals, 2 Cir., 150 F. 2d 829, had applied the state statute of limitations of ten years, Civil Practice Act N. Y. 53, under what it conceived to be the teaching of York. The Supreme Court reversed solely on the ground that a federally-created right was involved and held that plaintiff's right to recover would be decided entirely upon consideration of the doctrine of laches. The language fits this case perfectly:

> "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. * * * The rub comes when Congress is silent. Apart from penal enactments,

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[19] and cf. United States v. Harris, 5 Cir., 1954, 216 F. 2d 690, 691, and Wilson Cypress Co. v. Atlantic Coast Line R. Co., 5 Cir., 1940, 109 F. 2d 623.

[20] The opinion was written by Mr. Justice Frankfurter who had also, a few months before, written the opinion in Guaranty Trust Co. of N. Y. v. York, 1945, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079. There, the Supreme Court had held that a state statute of limitations governed a suit in equity in a federal court upon a state-created right and based solely upon diversity of citizenship. A reading of that case is necessary to grasp the full import of Holmberg v. Armbrecht.

Congress has usually left the limitation of time for commencing actions under national legislation to judicial implications. As to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation. * * * The implied absorption of State statutes of limitation within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles. * * *

"The present case concerns not only a federally-created right but a federal right for which the sole remedy is in equity. * * * And so we have the reverse of the situation in Guaranty Trust Co. [of N. Y.] v. York, supra. * * * We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress. When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights." 327 U. S. at page 395, 66 S. Ct. at page 584.

"Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief. Such statutes have been drawn upon by equity solely for the light they may shed in determining that which is decisive for the chancellor's intervention, namely, whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair. * * *

Appendix C

"Equity eschews mechanical rules; it depends on flexibility. Equity has acted on the principle that 'laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced, an inequity founded upon some change in the condition or relations of the property or the parties.' " 327 U. S. at page 396, 66 S. Ct. at page 584.

"We conclude that the decision in the York case is inapplicable to the enforcement of federal equitable rights. * * * When the liability, if any, accrued in this case * * * and whether the petitioners are chargeable with laches, * * * are questions as to which we imply no views. We leave them for determination by the Circuit Court of Appeals to which the case is remanded." 327 U. S. at pages 397-398, 66 S. Ct. at page 585.

[10] The cases cited in Holmberg v. Armbrecht point out and define the factors which will guide the trial Court in deciding whether a plaintiff has been guilty of such laches as will make it unfair or inequitable to permit his action to be prosecuted. See particularly Benedict v. City of New York, 1919, 250 U. S. 321, 326-328, 39 S. Ct. 476, 63 L. Ed. 1005; and Russell v. Todd, 1940, 309 U. S. 280, 287, 288, 60 S. Ct. 527, 531, 84 L. Ed. 754. It is worthy of note that in each of these cases it is stated that federal courts applying the doctrine of laches "even though not regarding themselves as bound by state statutes of limitations, will nevertheless, when consonant with equitable principles, adopt and apply as their own, the local statute of limitations applicable to the equitable

causes of action in the judicial district in which the case is heard."[21] Upon another trial, the District Court will doubtless apply these well-established doctrines.

Appellant further assigns as error the rulings of the Court below with respect to the United States as a party. By leave of the Court, the United States, averring that the collector had paid the amount of the tax involved in the original action into the Treasury and that the United States was the real party in interest, filed its complaint in intervention against appellant seeking to recover a balance of $93,589.64 claimed to be due on 1944 taxes after crediting the $70,000.00 sued for by appellant. That proceeding was at issue when the question of the alleged tardy substitution of Edwards, administrator, was brought before the Court by his motion to dismiss the original action. Simultaneously the United States asked leave to dismiss its complaint in intervention contingent upon the granting of Edwards' motion to dismiss.

Appellant, thereupon, countered with several defensive maneuvers, including a motion to substitute the United States as party defendant in lieu of the collector and his administrator. The Court below denied this motion without prejudice and, at the same time, granted the motion of the United States to dismiss its complaint in intervention conditioned, however, upon its bringing suit

[21] No statute of Georgia is found requiring substitution of executor or administrator within any specified time. Georgia Code Annotated § 3-402 prevents such substitution until after the expiration of twelve months from the granting of letters. And the § 3-501 covers survival of causes of action. And the § 3-704 requiring actions against executors and other fiduciaries to be brought within ten years after accrual

against the appellant upon the same claim within a specified time.[22]

[11] It may be that appellant will not, at another trial, press for substitution of the United States as a party; or that the pleadings in the suit described in fn. 22 may contain admissions or declarations pertinent and important to be considered on another trial of the issues here involved; or that the judgment mentioned in the footnote may have some bearing on the pending action. Moreover, the motion of the United States to dismiss its complaint in intervention was made specifically contingent upon the granting by the Court below of appellee's motion to dismiss the original action. That dismissal being now declared to be error, the order dismissing the complaint in intervention stands without a sound base. That order and the one denying appellant the right to substitute the United States, should, therefore, be vacated so that the Court below may consider and act upon the entire case as it unfolds in a new trial.

The orders appealed from are, therefore, reversed and the cause is remanded for further proceedings in conformity with this opinion.

Reversed and remanded.

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[22] We are advised by the briefs and the argument that the United States brought this suit against appellant and that the pleadings set out a full recital of the points of contention between the parties with respect to appellant's 1944 taxes. It appears that the entire additional assessment for 1944 grew out of operations of two family partnerships with which appellant was connected and the effort of the Commissioner to assess the income of those partnerships to appellant personally rather than to the partners. The Court below decided that action in favor of the appellant and the United States gave notice of appeal. This notice was subsequently withdrawn so that the judgment has become final.